Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1307

DAVIS OIL COMPANY, *et al.*,

Petitioners,

vs.

A. B. PARVIN,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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DAVIS OIL COMPANY, *et al.*,

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A. B. PARVIN,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Davis Oil Company, Jack Davis, Marvin Davis and Paul Messinger pray that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit (the "1979 Opinion") is set forth in Appendix "A" and has not yet been officially reported. This is the second Opinion by the Ninth Circuit in the case. In its first Opinion (the "1975 Opinion"), officially recorded at 524 F.2d 112, the Court of Appeals reversed the initial judgment issued by the District Court below and remanded the case for proceedings consistent with its opinion. A copy of this opinion is set forth in Appendix "B". The Judgment and Findings of Fact and Conclusions of Law of the District

Court for the Central District of California was entered on January 14, 1977. The Findings of Fact and Conclusions of Law include by reference the Court's Memorandum of Decision filed on October 24, 1973 (the "1973 Opinion") as modified and amended by the Court's Memorandum of Decision filed June 16, 1976 (these four documents are collectively referred to herein as the "1977 Opinion"). A copy of the 1977 Opinion is set forth in Appendix "C". The District Court's 1977 Opinion has not been officially reported.

JURISDICTION.

The Judgment of the Court of Appeals for the Ninth Circuit was entered on November 26, 1979. This Petition for Writ of Certiorari was filed within ninety days of such entry. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

Plaintiff A. B. Parvin, "a highly sophisticated businessman, knowledgeable in oil investments" seeks to enjoy risk-free participation in certain oil exploration projects by rescinding his participation in those specific projects which failed to produce a profit and by collecting statutory interest from the initial date of his participations therein.

The questions presented are:

I

Whether the extraterritorial reach of the California blue sky laws is so great as to void agreements negotiated and entered into in good faith outside of California simply because *either* (a) payment was made by a check mailed from California *or* (b) the written

documentation memorializing the agreement was signed by buyer in California.

II

Whether the unrevealed intent of participant in an oil exploration project not to treat his participation therein as a joint venture is sufficient to negate objective evidence, including the parties' written agreement, of such joint venture participation.

III

Whether oil drilling programs which retain for participants the right to control significant risk related decisions, including issues relating to well development and the marketing of any product produced, are rendered void merely because participants have elected not to exercise control over day-to-day drilling operations.

STATUTORY PROVISIONS INVOLVED.

At all times relevant to this case, former California Corporations Code § 25100(m) provided as follows:

> "Except as otherwise expressly provided in this division, the Corporate Securities Law does not apply to any of the following classes of securities:
>
> * * *
>
> "(m) any bona fide joint venture interest, except such interest when offered to the public."

Prior California Corporations Code § 26100 provided that:

> "Every security of its own issue sold by any company without a permit of the commissioner then in effect authorizing the issuance or sale of the security is void."

STATEMENT OF CASE.

A. Respondent's Complaint.

Respondent's Complaint, filed on July 13, 1970, presents state and federal claims seeking the return of all monies paid to Petitioner Davis Oil Company ("DOC") pursuant to Respondent's participation in three separate oil drilling projects. Jurisdiction in the federal courts was based upon Section 27 of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78(aa) and, as Respondent is a citizen of California and Petitioners are all citizens of Colorado, on the basis of diversity of citizenship (28 U.S.C. § 1332). The Court of Appeals for the Ninth Circuit upheld the District Court's Judgment on the basis of Respondent's state claims. These claims alleged that (i) the participation agreements between Respondent and DOC were securities under California law which could only be sold pursuant to permit; (ii) no permits were obtained; and (iii) that such sales were accordingly void. The Court of Appeals did not address Respondent's claims under the Securities Exchange Act of 1934.

B. Statement of Facts.

1. Parties.

Petitioner DOC is a partnership engaged in the oil exploration business. Its principal place of business is in Denver, Colorado, and all of its partners (including Petitioners Jack Davis and Marvin Davis) are residents of Colorado. Paul Messinger is an employee of the partnership and likewise a resident of Colorado.

Respondent A. B. Parvin is a highly sophisticated businessman, knowledgeable in oil investments (Appendix "C" at page 54), and a resident of Beverly Hills, California. Not including his transactions with DOC, Respondent has over the years participated in more than a dozen oil ventures (CR 640[1]). He is also a man prone to manipulate the laws regulating securities transactions to attempt to recover his investments in those ventures in which he has become dissatisfied. (RT 87-90; see also the unreported decision in *A. B. Parvin v. Fulk,* (C.D. Cal. 1972) Civil No. 71-1118-LTL.)

2. The Oil Ventures.

At the time of Respondent's participations, certain joint venture agreements were exempted from California's permit requirements.[2] Respondent participated with DOC in three separate oil ventures, identified below as the "Savoie", "Offset" and "Wildcat" projects. The District Court found these projects not to constitute joint ventures, and this finding has been approved by the Court of Appeals. Petitioners contest this characterization.

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[1]The record on appeal below consists of 5 volumes: The Clerk's Record, volumes I, II, III and supplement consists of 750 pages and will be referred to herein as "CR", followed by a number or numbers designating the page or pages of the Clerk's Record to which the reference is made. The Reporter's Transcript consists of 337 pages and will be referred to herein as "RT", followed by the number or numbers designating the page or pages of the Reporter's Transcript to which the reference is made.

Plaintiff's exhibits are designated 1 through 152, and defendant's exhibits are designated E through HU. Plaintiff's exhibits will be referred to herein as "PX" and defendant's as "DX".

[2]Today that exception is contained in modified form in California General Corporation Law § 25102(f).

The first of the participation agreements (the Savoie project) was consummated in 1968 following seven years of social and business dealings between Petitioner Marvin Davis and the Respondent. The facts surrounding the offering and consummation of this participation agreement are disputed. Petitioner Marvin Davis testified that the participation agreement was both offered and accepted in Colorado. Respondent asserts that the offer was made in a telephone call to him in Los Angeles. The parties' agreement was never reduced to writing.

The participation agreements pertaining to the Offset and Wildcat projects were reduced to writing. These agreements were mailed to Respondent from Denver to Los Angeles, executed by him in Los Angeles and returned to Colorado. In the case of the Wildcat project, the terms were fully negotiated and accepted in Colorado prior to execution of the document memorializing that agreement (Appendix "B" at page 11).

The written agreements memorializing the Offset (PX 26; CR 90-119) and Wildcat (PX 36; CR 124-152) projects were copies of the form agreement generally used in the oil industry to structure joint oil ventures and provided Respondent with substantial and ongoing participation in and right of control over those projects (RT 163). Specifically, the agreements provided Respondent with each of the following controls:

(i) Respondent had at all times complete and free access to the derrick floor and to all information obtained in the course of drilling, including daily drilling reports, final prints of all electrical surveys run, all core analyses, drill-stem test

charts, completion reports and governmental and geographical reports.

(ii) Unanimous consent of all parties, including Respondent, was required to drill additional wells, rework, plug-back or deepen authorized wells, and to settle lawsuits for an amount in excess of $1,000.

(iii) Subject to certain exceptions, no single project could be undertaken without the consent of all the parties unless the project was reasonably estimated to require an expenditure not in excess of $5,000.

(iv) Respondent had the right to avoid further financial commitments to a particular drilling project by opting out at the casing point.[3]

(v) Respondent, in the event he elected to proceed in the development of the well past the casing point, was entitled to separately receive and market any production realized therefrom.

Respondent had no day-to-day control over the physical drilling of the well, as DOC had been retained by the venture to serve as general contractor for the drilling operations.

The participation agreements were substantially similar to that executed by Respondent with Occidental Petroleum Corporation, which is apparently accepted by Respondent as establishing a joint venture. Moreover, Respondent has admitted that the participation agreements were something more than mere investment

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[3]The casing point is that point at which the decision is typically made whether to incur the further expenses necessary to prepare a well for production including the insertion of pipe into the hole, or in the alternative, to abandon the project.

contracts, referring to DOC as his partner in certain correspondence with Marvin Davis.

For tax purposes, the participation agreements were treated by DOC as an "organization" availed of for the "joint production, extraction, or use of property" under Section 761(a) of the Internal Revenue Code.

Respondent concedes that the terms of his oral agreement with the Petitioners pertaining to the Savoie project were substantially similar to the terms of the Offset and Wildcat projects.

DOC did not obtain a permit from the California Commissioner of Corporations for the offer or sale of the participating agreements to Respondent. But neither did it intentionally seek to evade California law (See, Appendix "B").

3. Prior Opinions.

The District Court initially found the participation agreements not to constitute securities for purposes of the California or federal securities laws. The District Court further found (on disputed evidence as to where the agreements were negotiated and agreed to) that "the transactions were consummated and the contracts entered into outside the State of California and extrinsic to any conversations between the parties conducted by telephone."

In its 1975 Opinion the Court of Appeals reversed, finding the participation agreements to constitute securities and further finding each of the transactions to have involved a "sale" of securities in California,

triggering the California permit requirement. In the case of the Savoie project, the signing of a check in Los Angeles was found to constitute the "sale". In the case of the Offset and Wildcat projects, the sending of the agreements to Respondent in Los Angeles and his execution thereof in that city were held to constitute the "sales" even though all the terms of the Wildcat agreement had been previously agreed to in Colorado. Having so ruled, the Court of Appeals remanded.

In its 1977 Opinion, the District Court found Respondent, as a matter of law, to have had an insufficient right of control over the essentials of the drilling operations to be a joint venturer. The District Court also found that the circumstances of the case "failed to establish an intent to create joint venture". The Court of Appeals, in its 1979 Opinion, upheld these findings and affirmed, characterizing the joint venture issue as one fact, and affirming the District Court's opinion on the basis of (i) the District Court's finding that "the major decisions—those most affecting the ultimate success or failure of the enterprise—were to be made solely by the defendants;" and (ii) the District Court's purported finding that "the parties themselves never intended to create a joint venture."

REASONS FOR GRANTING THE WRIT.

I

THIS CASE PRESENTS IMPORTANT ISSUES CONCERNING THE EXTRATERRITORIAL EFFECT OF STATE BLUE SKY LAWS.

A.

The Expansive Extraterritorial Effect Given to the California Blue Sky Laws by the Ninth Circuit Conflicts With California Law and With the Effect Given to Similar Blue Sky Provisions by the First Circuit and Threatens the Validity of Interstate Transactions.

The Court of Appeals for the Ninth Circuit ruled below that the mere signing of a check in California is, in and of itself, a "sale" in California and triggers that state's blue sky law provision which renders void certain securities if issued or sold in California without a permit (California Corporations Code § 26100).[4] This ruling was not based upon any analysis of the legislative history underlying the California blue sky laws nor was it based upon any California case reaching a similar result. Rather, the Court of Appeals founded its expansive reading solely upon the proposition that as the statute is designed to protect purchasers, it should be broadly construed.

The Court of Appeals decision is in direct conflict with the California Court of Appeal case, *Oakley v. Rosen*, 76 Cal.App.2d 310, 173 P.2d 55 (1946). There the Court found that state's blue sky laws to

[4]The California blue sky laws were substantially modified in 1968. The provision allowing rescission in the case of sales in violation of the California permit requirement is now contained in California General Corporation Law § 25503. The definition of the terms "sale", "sales" and "offers to sell" are set forth in Sections 25008 and 25017.

have no application to a transaction executed in New York, even though the agreement was signed by one of the plaintiffs in California and funds under such agreement transmitted from California to New York, where the final act necessary to effect the agreement was done beyond the borders of California. Admittedly, the California statute has been modified since the *Oakley* decision was rendered. However, later cases support *Oakley's* continued validity. In *Levan v. Legarra,* 103 Cal.App.2d 319, 229 P.2d 383 (1951), the Court by implication likewise found the mere execution of a check in California to be insufficient to justify application of the California blue sky laws.

Moreover, the Ninth Circuit's interpretation of the term "sale" to include the execution of a check in California is in direct conflict with the First Circuit's interpretation of the same term under the New Hampshire blue sky law. *See Doherty v. Bartlett,* 81 F.2d 920 (1st Cir. 1936), *reh. den.,* 83 F.2d 259, *cert. den.,* 298 U.S. 676. The New Hampshire statute there prohibited the sale, offer for sale or invitation of offers for or inquiries about securities by a person not registered as a dealer thereunder. Sales made in violation of that statute were held by the court therein to be void. In that case, the First Circuit ruled, *inter alia,* that the mere mailing of a check by the plaintiff from New Hampshire to Boston was not sufficient to constitute a sale, offer for sale or invitation of an offer in New Hampshire. As is the case in the opinion below, that ruling was not based upon any review of relevant legislative history.

The approach adopted by the Ninth Circuit exposes the validity of interstate transactions to significant uncertainty. Even in cases where a transaction is com-

pletely negotiated and executed within a state allowing such transactions, the Ninth Circuit's approach imposes upon issuers the risk that buyers will use a foreign state's blue sky laws to engineer a no-risk investment by the simple device of mailing any payment required of them from such foreign state. Such an interpretation does nothing to advance a state's interest in protecting its residents. Indeed, in the case of California, such an expansive reading is in direct conflict with the position expressed by the California Supreme Court in *Robbins v. Pacific Eastern Corp.*, 8 Cal.2d 241, 273-274, 65 P.2d 42 (1937), that investors should not be allowed to undo obligations, entered into by others in good faith, by reliance upon expansive interpretations of the California blue sky laws.

> "It is no answer to point out, as do appellants, the strong public policy behind the corporate securities act. That statute is undoubtedly a salutary law. The same can be said of the usury law, the statutes restricting corporate action, and many other statutes to which the rule of construction here being discussed has been applied. This rule of interpretation must be applied by the courts, unless a contrary construction is compelled by the terms of the contract. It is peculiarly applicable in the present case where the plaintiffs, and the other stockholders, got exactly what they wanted and what they bargained for—where no fraud or imposition has been proved—and where they are now trying to recoup their losses, by a strained and technical construction of the contract, from what turned out to be a bad bargain."
>
> *Robbins v. Pacific Eastern Corp.*, 8 Cal.2d 241, 273, 65 P.2d 42, 59.

Or, as noted by the California Court of Appeal in *B. C. Turf & Country Club v. Daugherty*, 94 Cal.App. 2d 320, 210 P.2d 760 (1949):

> "While regulation is necessary in this field, and honest, legitimate business must, under the police power, submit to reasonable controls in order to effectuate the purpose of the statute, the controls, by strained construction, should not be extended to wholly unnecessary, unreasonable or absurd lengths. The courts must approach this problem with some degree of realism."
>
> *B. C. Turf & Country Club v. Daugherty*, 94 Cal.App.2d 320, 330, 210 P.2d 760, 766.

Unless this Petition is granted and the holding below reversed, it will stand as precedent for an extraordinarily expansive application of the extraterritorial reach of the California blue sky laws in effect from time to time. As most state securities issues are combined with claims under the federal securities laws and tried in the federal courts, such a precedent will seriously undermine the pragmatic approach adopted by the California courts, and will likewise seriously undermine the validity of interstate transactions.

B.

The Ninth Circuit's Expansive Extraterritorial Application of the California Blue Sky Laws to Apply to a Transaction Negotiated and Accepted by Plaintiff in Colorado, Simply Because the Document Memorializing That Agreement Was Signed in California, Conflicts With California Law and Presents an Important Issue as to the Extraterritorial Effect of That State's Blue Sky Laws.

The District Court, in its Memorandum of Decision dated October 24, 1973, determined that "the transac-

tions were consummated and the contracts entered into outside of the State of California and extrinsic to any conversations between the parties conducted by telephone" (Appendix "C" at page 55). The Circuit Court acknowledged that, as to the Wildcat transaction, there was evidence that Respondent orally agreed to participate in the program while in Colorado and that the terms of the Agreement were settled at that time (Appendix "B" at pages 11 and 16). Still, the Court of Appeals ruled that for purposes of the California blue sky laws, as they then stood, a sale had been made in California.

This expansive reading of the extraterritorial effect of California's blue sky laws is contrary to applicable California law. California law looks not to the place of the signing, but to the place where the last act occurred necessary to create a contract.[5] *See B. C. Turf & Country Club v. Daugherty, supra;* and *Oakley v. Rosen, supra.* This expansive reading is also contrary to the policy enunciated by the California courts, discussed above, that that state's voiding provisions not be construed in such a contorted manner as to undo transactions entered into by others in good faith

[5]It would be incorrect to argue that the California statute of frauds makes California the situs of the Wildcat agreement Even if the statute of frauds were applicable, it would go to the contract's enforceability in court and not to the creation thereof. Furthermore, that statute may be waived either expressly or by conduct. A writing is necessary for the creation of a contract only where such is the intent of the parties. *See, e.g., Frankenheimer v. Frankenheimer,* 231 Cal.App.2d 101, 108-109, 41 Cal.Rptr. 636 (1964). The presence or absence of such an intent is a matter of fact (*Frankenheimer v. Frankenheimer, supra*). In the instant case, the District Court found against the existence of any such intent when it rendered its ruling that the Wildcat agreement was consummated and entered into outside of California. As mentioned above, this finding was not challenged by the Court of Appeals.

and beyond the boundaries of California. *Robbins v. Pacific Eastern Corp., supra; B. C. Turf & Country Club v. Daugherty, supra.*

Unless this Petition is granted and the decision below reversed, it will stand as precedent for an unreasonably expansive interpretation of the extraterritorial reach of California's blue sky laws in effect from time to time. As the justification for such a broad application is founded solely upon the Ninth Circuit's opinion that such a broad application is necessary to protect purchasers, it is a precedent whose impact goes substantially beyond the wording of whatever California statute may be then in effect.

II

THE NINTH CIRCUIT'S APPROACH TO OIL AND GAS JOINT VENTURES PLACES SEVERE AND UNNECESSARY BURDENS UPON PARTIES WISHING TO ORGANIZE SUCH JOINT VENTURES AND IS CONTRARY TO APPLICABLE CALIFORNIA LAW.

This nation has committed itself to the pursuit and achievement of energy sufficiency. If this goal is to be met, energy exploration must be encouraged and the erection of new barriers to the flow of capital into this area must be discouraged. The interpretation of the California joint venture exception adopted by the court below is out of step with this commitment. It has resulted in the striking down, as a void security, of one of the standard form oil exploration participation agreements used by the oil industry. In so holding, the court below has severely diminished the utility of a very valuable form of oil exploration transaction and has erected a new and substantial barrier to the creation of oil exploration joint ventures.

The District Court ruled that "as a matter of law" the various agreements did not constitute joint venture agreements under the California statute. The Court of Appeals affirmed that finding on the basis of the District Court's findings that those decisions most affecting the ultimate success or failure of the enterprise were to be made solely by DOC and that the parties themselves never intended to create a joint venture. In so ruling, the Court of Appeals failed to realize that, in California, it is not actual control but the "right" to control significant decisions which is essential to a joint venture. *See UFITEC, S.A. v. Carter,* 20 Cal.3d 238, 142 Cal.Rptr. 279 (1977); *Connor v. Great Western Savings & Loan Assn.,* 69 Cal.2d 850, 73 Cal.Rptr. 369 (1968); *People v. Miller,* 192 Cal. App.2d 414, 13 Cal.Rptr. 260 (1961); *Stilwell v. Trutanich,* 178 Cal.App.2d 614, 3 Cal.Rptr. 285 (1960); *Oakley v. Rosen,* 76 Cal.App.2d 310, 173 P.2d 55 (1946); and *Vicioso v. Watson,* 325 F.Supp. 1071 (C.D. Cal. 1971). In so ruling the Court of Appeals also misinterpreted the District Court's finding as to intent and failed to give proper deference to the California objective rule of contracts.

California does not require that all members of a joint venture participate equally in the day-to-day operations of the venture. As stated by the Court in *Stilwell v. Trutanich* a joint venture may exist

> "although the property forming the capital of the adventure is not jointly owned by the parties . . . and although one of the parties has contributed money, another property and another skill. . . ."
>
> *Stilwell v. Trutanich,* 178 Cal.App.2d 614, 619, 3 Cal.Rptr. 285, 288.

Or, as stated in the often cited case, *Oakley v. Rosen, supra* at 76 Cal.App.2d 310, 313-314:

> "The fact that appellee was to produce the play without the assistance of appellants makes it nonetheless a joint venture. Many successful enterprises owe their pronounced achievements to the program and direction of a single mind."
>
> *Oakley v. Rosen,* 76 Cal.App.2d 310, 313-314, 173 P.2d 55, 57.

In *Vicioso v. Watson, supra,* the question also involved the joint venture status of an oil participation agreement. There the Court found the existence of a joint venture despite a lack of direct control by the plaintiff.

> "Under the terms of the contract in our case, plaintiffs were to receive daily drilling reports, they were welcome at the drilling sites, they were not billed for the cost of production after it was undertaken, but provided the cost of drilling in proportion to their interest prior to the undertaking of the drilling. I conclude that the plaintiffs had a right to control the drilling operations, but deferred exercise of this control and chose to rely on the greater expertise of the defendant. In light of the interpretation of the term 'right to control' and the general concept of joint venture . . ., it seems clear that a joint venture existed in the present suit."
>
> *Vicioso v. Watson,* 325 F.Supp. 1071, 1076.

In the instant case, Respondent had all the rights and controls identified, *supra.* Under the standards applied by the California courts, these controls should

have been more than sufficient. The fact that Respondent and his fellow joint venturers chose to retain DOC as an independent contractor to supervise the day-to-day line operations does not negate the existence of a joint venture.

The Court of Appeals also purports to rely upon the District Court's findings relating to intent. However, whereas the Court of Appeals interpreted the District Court's opinion as finding an intent not to create a joint venture, the District Court in fact went no further than to find that the circumstances surrounding the agreements failed to establish an intent to create a joint venture. In relying upon this finding, the Court of Appeals failed to heed the warning contained in *United States v. United States Gypsum Co.*, 333 U.S. 364, 396, 68 S.Ct. 525, 92 L.E d. 746 (1948), that where oral testimony is in conflict with contemporaneous documents, the Court can give it little weight, particularly where the crucial issues involved are, as here, mixed ones of fact and law.

In placing such heavy reliance upon this intent issue, the Court of Appeals also failed to heed the objective theory used to interpret contracts by the California court. *See King v. Stanley*, 32 Cal.2d 584, 591, 197 P.2d 321 (1948); *Brant v. California Dairies, Inc.*, 4 Cal.2d 128, 133, 48 P.2d 13 (1935); *Ellena v. State of California*, 69 Cal.App.3d 245, 262, 138 Cal.Rptr. 110 (1977); *Union Bank v. Winnebago Industries, Inc.*, 528 F.2d 95, 99 (9th Cir. 1975).

In the instant case, the uncontroverted provisions of the participation agreements themselves were clearly sufficient to establish a joint venture. The Court below, however, chose to look (i) to the extent to which control was actually exercised by Respondent and (ii) to Respondent's unspoken intent not to treat the transaction as a joint venture. This approach improperly interprets the joint venture exception, as it fails to recognize that it is the right to control and not the actual exercise of control which is required and fails to give proper weight to the undisputed terms of the parties' agreements. It is a burdensome precedent, in that it makes virtually any joint venture agreement subject to attack by simple allegation that one of the parties involved did not "in fact" exercise control and that he never intended the agreement to constitute a joint venture. It is a precedent which is contrary to law, and to this nation's energy development needs.

III
CONCLUSION.

The Ninth Circuit has interpreted California law to require expansive extraterritorial application of its blue sky laws and as requiring an actual exercise of control over day-to-day operations before an agreement may be deemed a joint venture. The Ninth Circuit has also failed to accord proper significance to the undisputed terms of the written agreement between the parties. This decision constitutes a precedent which is at odds with California law and which poses both

a substantial threat to the validity of interstate transactions and a substantial burden upon persons wishing to establish oil and gas joint ventures in California. If state blue sky laws are to be kept within their proper bounds and if oil and gas exploration in this country is to be encouraged, this precedent must be reversed.

For these reasons, Petitioners respectfully submit that a Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX "A".

Opinion.

United States Court of Appeals for the Ninth Circuit.

A. B. Parvin, Plaintiff-Appellee and Cross-Appellant, v. Davis Oil Company, Jack Davis, Marvin Davis, and Paul Messinger, Defendants-Appellants and Cross-Appellees. No. 77-1663; No. 77-1664.

Filed: Nov. 26, 1979.

Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS and HUFSTEDLER, Circuit Judges, and FITZGERALD,* District Judge.

HUFSTEDLER, Circuit Judge:

Parvin sued Davis Oil Company ("DOC") for damages arising from three investment contracts that Parvin contended violated both California and federal securities laws. The district court initially dismissed the action finding that (1) the oil and gas lease interests were not securities under either California or federal law, (2) the transactions did not involve sufficient contacts with California to permit application of California law, and (3) the transactions were private offerings exempted from the registration requirements of the Securities Act of 1933. We reversed (*Parvin v. Davis Oil Co.* (9th Cir. 1975) 524 F.2d 112), and we remanded the cause to the district court to decide whether the securities qualified under the joint-venture exception to the California permit requirement and whether Parvin had the kind of access to information that would have appeared in the registration statement.

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*Honorable James M. Fitzgerald, United States District Judge, District of Alaska, sitting by designation.

On remand, the district court found that these transactions failed to qualify under the joint venture exception under California law and that they failed to qualify under the private offering exception from the registration requirements under the Securities Act of 1933. The district court held further that DOC's failure to inform Parvin that the securities were not registered under either California or federal law constituted a violation of § 10(b) of the Securities and Exchange Act of 1934. Therefore, the district court decided that Parvin was entitled to the return of the money he had invested. The district court denied an award of prejudgment interest, exercising discretion that the court believed it had under applicable California and federal law.

DOC appeals from that portion of the judgment holding the joint venture exemption and the private offering exemption inapplicable. Parvin appeals from that portion of the judgment declining to award prejudgment interest.

Parvin is a retired California businessman who has had substantial experience with investment in oil and gas properties. DOC is a partnership composed of Jack Davis, Marvin Davis, and Jean Davis, which has its principal place of business in Denver, Colorado; it is engaged in oil and gas exploration. Parvin maintained a periodic social and business relationship with the Davises from the early 1960s until the beginning of this litigation. During 1968, DOC offered and sold to Parvin investments in three separate DOC oil and gas drilling programs, referred to respectively as the "Savoie," "Offset," and "Wildcat" programs.

The investors in the Savoie, Offset, and Wildcat leases were composed of three separate groups. Generally speaking, each group had been put together by a friend or a business associate of the Davises and was composed of that person and a number of his friends and business associates. Each member of the group signed an agreement with DOC that was identical with the agreement signed by everyone else, with the exception of the names of the parties, the percentages of their interests, the amounts of their payments, and the names of well prospects included. (Parvin himself was an exception to the extent that he did not execute a written agreement for the Savoie lease.)

The Davises never met with these investing groups, and there was no interaction between the different groups or their members. The Davises selected the leases to be invested in and the sites to be drilled. They also conducted both the exploration and the drilling. Under the terms of the agreement, the individual investors did have the right to receive daily drilling reports, final prints of all electrical surveys run, all core analyses, drill-stem test charts, completion reports and governmental and geographical reports. They also had free access to the derrick floor and to all information obtained in the course of drilling.

In the case of the Savoie lease, DOC drilled an unsuccessful well and none of the participants received any income from his interest in the project. The underlying oil and gas leases have, by their terms, expired. Parvin invested $15,000 in this project. DOC drilled four wells on the Offset project. Three of the wells were plugged and abandoned, and the leases underlying them have expired. The fourth well was sold to another company in 1969. Parvin paid DOC $92,-651.78 and received a return of $2,008.67 on the

Offset leases. Similarly, four wells were drilled under the Wildcat lease and three of the wells were plugged and abandoned. The fourth produced some oil for a time, but none recovered its costs. Parvin paid DOC $103,740.80 and eventually received a return of $4,-422.71. If Parvin prevails under either California or federal law, he is entitled to rescind and to recover his investments, less the amount he has received.

I

This action arose under the old California Corporate Securities Law (Cal. Corp. Code §§ 25000 et seq. (West 1954)), as amended as of January 2, 1969. Section 25100 of that law requires an issuer of a security, such as DOC, to obtain a permit before selling any security, unless it falls under one of the enumerated exemptions to that requirement. DOC argues that the joint venture requirement is applicable.

California courts have defined a joint venture as "an undertaking by two or more persons jointly to carry out a single enterprise for profit." (*Stilwell v. Trutanich* (1960) 178 Cal. App. 2d 614, 3 Cal. Rptr. 285, 288.) The California courts traditionally look to the intention of the parties to determine whether a joint venture existed. (*Holtz v. United Plumbing & Heating Co.* (1957) 49 Cal. 2d 501, 319 P.2d 617, 620; *Stilwell v. Trutanich, supra.*) Typically, the inquiry addresses four factors: (1) "a community of interest in the subject of the undertaking"; (2) "a sharing in profits and losses"; (3) an " 'equal right' or a 'right in some measure' to control the conduct of each other and of the enterprise"; and (4) "a fiduciary relation between or among the parties." (*Id.* at 288; *Goldberg v. Paramount Oil Co.* (1956) 143 Cal. App. 2d 215; *see Vicioso v. Watson* (C.D. Cal.

1971) 325 F. Supp. 1071.) Whether a joint venture exists rests primarily on the facts of the individual case. (*Nelson v. Abraham* (1947) 29 Cal. 2d 745, 750, 177 P.2d 931; *Spier v. Lang* (1935) 4 Cal.2d 711, 716, 53 P.2d 138; *Bank of California v. Connolly* (1973) 36 Cal. App. 3d 350, 364, 111 Cal. Rptr. 468, 478.)

On remand, the court below reexamined the evidence presented to it to determine whether a joint venture existed. It properly addressed, among other things, the control Parvin and the others exercised over the project. (*See id.*) By agreement, these investors were entitled to receive notices concerning the progress of the drilling, were afforded access to the drilling sites, and were allowed a voice in deciding whether to drill past the casing point. However, the court below looked beyond the written agreement "to all the facts and circumstances of the situation, including the subsequent conduct of the parties." It determined that those decisions most affecting the ultimate success or failure of the enterprise were to be made solely by DOC. The court below also found that the parties themselves never intended to create a joint venture. Both of these findings are supported by the record. Accepting these findings of fact, as we must (Fed. Rules of Civ. Proc. 52), we are compelled to affirm the court's determination that no joint venture existed, that the exemption is inapplicable, and that DOC should have sought a permit before selling the securities to Parvin. Parvin properly asserted his right to rescind the transactions.

II

Under California law, an award of prejudgment interest is governed by California Civil Code §§ 3287 and 3288. Section 3287(a) reads in relevant part: "Every

person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ." Section 3288 provides: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." California courts have not always interpreted the two statutes consistently. In *Nathanson v. Murphy* (1957) 147 Cal. App. 2d 462, 305 P.2d 710, the court held that whenever a noncontractual action arose, the question whether to award prejudgment interest lay in the discretion of the factfinder. DOC argues that this action to rescind the purchase of stock for failure to comply with the California Corporation Securities Act is treated as an action for fraud or for breach of implied warranty. (*See also Pepitone v. Russo* (1976) 64 Cal. App. 3d 685, 134 Cal. Rptr. 709.) Because the court below declined to award prejudgment interest, DOC argues that we must affirm this portion of the judgment.

DOC has not taken into account the more recent California cases interpreting these statutes to require the awarding of prejudgment interest whenever the sum in question is capable of exact determination. In 1964, the California Supreme Court in interpreting section 3287 emphasized its reluctance to make mandatory awards of prejudgment interest turn on the form of the action. (*Mass v. Board of Education* (1964) 39 Cal. Rptr. 739.) In *Tripp v. Swoap* (1976) 17 Cal. 3d 671, 552 P.2d 749, 131 Cal. Rptr. 789, the California Supreme Court expressly declined to limit § 3287(a) to contract actions. Moreover, the California Court of Appeals discussed the legislative history of §§ 3287

and 3288 at great length less than two years ago in *Levy-Zenter Co. v. Southern Pacific Transportation Co.* (1977) 74 Cal. App. 3d 762, 794-98, 142 Cal. Rptr. 1, 22-25. It declared that "when sections 3287 and 3288 were adopted in 1872, the key distinguishing factor was not . . . whether the cause of action arose in tort or contract, but rather whether the damages were readily ascertainable." (*Id.* at 795, 142 Cal. Rptr. at 23.) It held that "prejudgment interest must be granted as a matter of right if, as a matter of law, damages are 'certain, or capable of being made certain by calculation.'" (*Id.* at 798, 142 Cal. Rptr. at 25. (footnote omitted).) Under California law, when the question of liability is open to dispute, but not the amount of damages, in the event that liability is found to exist, damages are considered "certain." (*Esgro Central, Inc. v. General Insurance Co.* (1971) 20 Cal. App. 3d 1054, 1060-61, 98 Cal. Rptr. 153, 157; *Continental Bank v. Blethen* (1970) 7 Cal. App. 3d 178, 187, 86 Cal. Rptr. 485, 491.)) Under *King v. United Commercial Travelers* (1948) 333 U.S. 153, 158, we are bound by *Levy-Zenter* unless there is pervasive evidence that the California Supreme Court would rule otherwise. Given both *Tripp* and *Mass*, we can see no such pervasive evidence, and DOC offers us none. We are well aware of the factors that would lead the lower court to decline to award prejudgment interest were it free to do so. However, California law requires awards of such interest as a matter of law, where, as here, the sum is certain.

As we read *Mary Pickford Co. v. Bayly Bros.* (1939) 12 Cal. 2d 501, prejudgment interest should run from the time that the right to rescission arose, rather than the time the lawsuit was filed.

Because California law is dispositive, we do not reach any of the federal questions.

The cause is remanded to the district court to compute interest. In all other respects, the judgment is affirmed.

APPENDIX "B".

Opinion.

A. B. PARVIN, Plaintiff-Appellant, v. DAVIS OIL COMPANY et al., Defendants-Appellees. No. 74-1235.

United States Court of Appeals, Ninth Circuit.

Oct. 20, 1975.

Buyer of fractional interests in oil and gas leases brought action against seller charging violations of federal and state securities laws. The United States District Court for the Central District of California, Robert J. Kelleher, J., dismissed the action, and the buyer appealed. The Court of Appeals, Chambers, Circuit Judge, held that interest sold to buyer constituted securities under federal and California law; that sending of sales agreement to California and its execution there by California buyer constituted a sale of a security in California subject to California securities law; and that case would be remanded for a determination whether joint venture exemption and private offering exemption applied to transaction so as to release seller from obligation of obtaining a permit.

Reversed and remanded.

Peter M. Appleton (argued), of Tyre & Kamins, Los Angeles, Cal., for plaintiff-appellant.

Irwin I. Woodland (argued), of Gibson, Dunn & Crutcher, Los Angeles, Cal., for defendants-appellees.

Before CHAMBERS and HUFSTEDLER, Circuit Judges, and FITZGERALD,* District Judge.

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*Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

CHAMBERS, Circuit Judge:

Defendant Davis Oil Company (DOC) is a partnership, engaged in the business of gas and oil exploration. The partnership is composed of Marvin Davis and his parents, and has its principal place of business in Denver, Colorado. Plaintiff, Parvin, a California resident who has substantial experience with investment in oil and gas properties, first met the Davises in 1960 or 1961 when he purchased some properties in which they had an interest. After that time he maintained a periodic social and business relationship with them.

Involved in this case is Parvin's participation in three DOC oil and gas drilling ventures, referred to as the "Savoie," "Offset," and "Wildcat" programs. There is some dispute as to the circumstances surrounding Parvin's agreement to be a participant. In late 1967 or early 1968, Parvin-Dohrmann Co., of which plaintiff was chief executive, was hired to design and furnish DOC's new offices and to furnish Marvin Davis's home both in Denver. Marvin Davis testified that while Parvin was in Denver in January and February 1968, the Davises obtained the lease for the Savoie program and invited Parvin to join them in the project. According to Mr. Davis, Parvin immediately agreed to participate. This agreement was not reduced to writing. Parvin denies that the meeting occurred and says that he first became interested in investing in DOC in August 1966 when he met Jack Davis in Los Angeles. Then, on February 20, 1968, Jack Davis telephoned him and offered him an interest in the Savoie program. Under either version, Parvin mailed $15,000 to DOC in Denver on February 20. Marvin Davis acknowledged the receipt of plaintiff's check on February 27.

After the Savoie agreement, Jack and Marvin Davis met with Parvin twice in Los Angeles, but there was no indication that any significant discussion of Parvin's participation in future DOC projects took place at that time. On July 1, 1968 Jack Davis mailed a letter to Parvin which mentioned an investment in some wells in Louisiana and said that further information would be sent to Parvin if he indicated an interest. On July 3, 1968, Davis sent Parvin duplicate originals of a written agreement, signed on behalf of DOC, selling Parvin an interest in the Offset wells. Parvin signed the agreement in Los Angeles and sent one executed copy back to Davis. Letter agreements on this project were handled in the same manner.

On July 24, 1968, Jack Davis wrote to Parvin in California offering him an interest in the Wildcat program and inclosing duplicate originals of a written agreement signed on behalf of DOC. Parvin wrote to the Davises questioning some aspects of the program and a meeting was arranged in Denver for August 3. At that meeting Wildcat was discussed and it appears that Parvin orally agreed to participate in the program at that time. On August 6, 1968, he mailed an executed copy of the agreement and his check from Los Angeles to the Davises in Denver.

Plaintiff subsequently brought suit against defendants for violation of the Securities Act of 1933, the Securities Exchange Act of 1934, and the California Corporations Code as it existed prior to January 1969. After trial, the district court dismissed the action. On appeal, plaintiff challenges the findings of the district court that: (1) the interests in the gas and oil leases involved in these transactions were not securities under federal and California law; (2) there were insufficient contacts with California to render these transactions subject

to that state's laws; (3) the registration provisions of the Securities Act of 1933 did not apply to these transactions because they were private offerings. Error is also alleged in the court's refusal to admit certain evidence on the issue of the security status of the interests involved and in the failure of the district court to find a violation of the Securities Exchange Act of 1934 when defendants did not disclose the nonregistration of the interests and the failure to obtain a California permit.

I. Were the Interests Securities?

In order for the federal or state securities law to apply to these transactions, the interests involved must have been securities. These interests were fractional interests in oil and gas leases where the seller of the interests would conduct oil exploration operations on the leased land. Both the federal and California statutes include a fractional interest in an oil or gas lease within the definition of a security. 15 U.S.C. § 77(b)(1); Corporations Code § 25008(a).[1] This circuit has not determined under what circumstances such a fractional interest is a security under federal law. Those other circuits which have considered the issue have held such an interest to be a security when the seller or a third party will conduct drilling operations on the land subject to the leases and it is from these operations that the buyer expects to derive his profit. *Nor-Tex Agencies, Inc. v. Jones,* 482 F.2d

[1]All references to "Corporations Code" refer to the 1949 version of the California Securities Law, Ch. 384, § 1, [1949], Cal.Stats. 698, as formerly codified at Cal.Corp.Code §§ 25000-26104 (1955). These sections were replaced with the Corporate Securities Law of 1968, Cal.Corp.Code §§ 25000-25804 (Supp. 1975), which became operative on January 2, 1969.

1093 (5th Cir. 1973); *Gilbert v. Nixon,* 429 F.2d 348 (10th Cir. 1970).

Further, this court has established a test for determining when an interest is an investment contract and, therefore, a security. *SEC v. Glen W. Turner Enterprises, Inc.,* 474 F.2d 476 (9th Cir. 1973). An interest in an enterprise is an investment contract where "the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which effect the success or failure of the enterprise." Applying that test it is clear that the oil interests sold in this case are investment contracts and therefore securities under the law of this circuit. While Parvin and the other investors had some rights with regard to these operations including the right to decide whether to continue drilling past the casing point, the major decisions which would effect success or failure were made by the Davises. They selected the leases to be invested in, the sites to be drilled, and made the decision to commerce drilling at any site. In addition they directed the drilling and exploration operations. Under the *Turner* test it is clear that the degree of control possessed by Parvin was not adequate to make the interest other than an investment contract.[2]

California law appears equally clear. That state's courts have continually held that fractional interests in oil or gas leases coupled with the seller's obligation to conduct an exploration or drilling operation are

[2]In *United Housing Foundation v. Forman,* 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621, 632 n.15 (1975), the Supreme Court declined to rule on the propriety of the test of investment contract adopted by this court in *Turner.* The interests involved in this case are securities either as a fractional oil lease coupled with an exploration operation or as an investment contract within the meaning of *Turner.*

securities. *Oil Lease Service, Inc. v. Stephenson,* 162 Cal.App.2d 100, 327 P.2d 628 (1958). The district court was in error in holding that the interests sold were not securities under federal and California law.

II. Should California Law Apply to These Transactions?

The district court held that even if the interests involved were securities under California law, that the transactions lacked adequate contact with California to make an application of that state's law proper. This was based on the determination of the district court that the portions of any of the three transactions that took place in California were not sufficient to amount to a sale or issuance of securities in California.

At the time of the transactions involved here, the California Securities Law provided:

> Every security of its own issue sold issued by any company without a permit of the commissioner then in effect authorizing the issuance or sale of the security is void.
>
> Corporations Code § 26100.

The application of this section to sales by out-of-state issuers to California residents is unclear. Prior to 1947, the voiding provision applied only to securities issued in California, not to those sold in California. Under that wording, the Supreme Court of California in *Robbins v. Pacific Eastern Corp.,* 8 Cal.2d 241, 65 P.2d 42 (1937), held that the voiding provision did not apply to a transaction where there were negotiations in California but the actual delivery of the stock took place in New York. This opinion has been interpreted as saying that the former voiding provision

would not apply unless there was an actual issuance or delivery of the stock in California. Loss, *The Conflict of Laws and the Blue Sky Laws,* 71 Harv.L.Rev. 209, 230-39 (1957). There has been no California Supreme Court opinion on the reach of the voiding provision now that the sale of stock is included in its terms.

There are two sources which aid in the interpretation of this provision. First, the California permit requirement with attached criminal penalties applied to both sales and issuance of stock in the state, even prior to 1947. Corporations Code § 25500. The statute defines sale for these purposes as including "an offer to sell; an attempt to sell; a solicitation of a sale; an option of sale; a contract of sale . . ." Corporations Code § 25009(a). The decision under this section deal largely with whether preliminary negotiations or the giving of information amount to an offer or solicitation of a sale. *See e.g., B. C. Turf & Country Club, Ltd. v. Daugherty,* 94 Cal.App.2d 320, 210 P.2d 760 (1949); *People v. Rankin,* 169 Cal.App.2d 150, 337 P.2d 182 (1959). From these cases, however, it seems clear that where any statutory element of a sale takes place in California, its courts have been willing to apply injunctive relief or criminal penalties for failure to obtain a permit. The second aid in our interpretation of the amended voiding provision is the opinion of the California Court of Appeals in *Hardy v. Musicraft Records, Inc.,* 93 Cal.App.2d 968, 209 P.2d 839 (1949). In this opinion the court held void some securities which it found to be both sold and issued in California. This case was decided under the unamended "issue" version of the voiding provision and the court found issuance in the delivery

of the securities in California. The court also treated the issue of whether there was a sale in California and found that when an agreement was drafted in New York and then sent to a California resident to sign and return to New York, there was a sale in California. Two recent district court opinions have interpreted the new voiding section in light of the prior *Robbins* decision to apply only where there is either the execution of a sales contract in California or delivery in that state. See *Robinson v. Cupples Container Co.*, 316 F.Supp. 1362 (N.D.Cal.1970) aff'd 513 F.2d 1274 (9th Cir. 1975); *Sandor v. Ruffer, Ballan & Co.*, 309 F.Supp. 849 (S.D.N.Y. 1970).

Applying these principles to the case before us, we cannot agree with the district court that California law should not apply to these transactions. While there are extensive Colorado contacts here and the parties did not intentionally seek to evade California law, there seems to be adequate contacts with California in this case to mandate application of the permit requirement. Here, the second sale of stock was almost identical to the situation in *Hardy*. The agreement was drafted without a prior meeting in Denver, and then sent to Parvin who signed it and returned it to Denver. The sending of this agreement into California, its signing there by Parvin, and its return constitute a sale of securities in California. The third transaction is similar to the second except that before Parvin signed the agreement in California there was a meeting between the parties in Denver. Even if all of the terms of the agreement were settled upon orally in Denver, the prior sending of the agreement to Parvin and his subsequent signing of it in California constitute a sale of securities in California. The first transaction

presents the most difficult question. There was an oral agreement between the parties in Denver and no written agreement was executed. As the purpose of the California Securities Law is to protect investor-residents, we consider that the payment by Parvin in the form of a check mailed from California, constituted a sale of securities in California so as to apply the voiding provision. The extent of the transactions contacts with Colorado is irrelevant. The question is not one of which jurisdiction's law ought to apply based on the greatest number of contacts, but rather whether the appellees by their actions brought themselves within the scope of the California Securities Law. We find that they did.

III. Do the California Joint Venture Exemption and the Federal Private Offering Exemption Apply to these Transactions?

Since we have found that the interests involved were securities under federal and California law and that the transactions were sales within California, the question remains whether any exemptions apply to render the state permit requirement or the federal registration requirement inapplicable.

Corporations Code § 25100 exempts from the permit requirement securities which are bona fide joint venture interests and which are not offered for sale to the public. The district court held that the interests in this case were not securities and it specifically did not reach the issue of whether a joint venture exemption would apply. While the district court did make comments on the joint venture issue, it did not make findings on the relevant factual issues or make a ruling on the application of this exemption. Because we have

held these interests to be securities, their exempt status is relevant to a final determination of this case. Therefore, on remand the district court should consider whether these securities qualify for a joint venture exemption.

The district court found that the private offering exemption applied to the transactions in this case and therefore the Securities Act of 1933 did not require their registration. The Supreme Court in *SEC v. Ralston Purina Co.*, 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953), set out the requirements of the private offering exemption. A private offering is one where the investors do not need the protection of the Act because they already have access to the kind of information that would be contained in a registration statement. Investor sophistication alone is inadequate, there must also be demonstrated the requisite access to information. Borton & Rifkin, *Private Placement and Proposed Rule 145*, 25 Hastings L.J. 287, 295-303 (1974). While the district court found in this case that Parvin was a previous investor in gas and oil properties and that by the terms of the agreements he had access to some information, the findings of the court do not indicate whether Parvin had full access to the sort of information that would have appeared in the registration statement. Absent a determination of this issue, there can be no ruling on whether the private offering exemption applies. On remand the district court should make more specific findings as to what information Parvin had as an experienced investor and what information he could obtain under the terms of the agreement.

Appellants argue that the district court erred in failing to find that the nondisclosure of the lack of a permit and nonregistration of the securities violated the Securities Exchange Act of 1934. Since we have made no determination as to whether registration or a permit are required, any ruling on this alleged violation would be premature.

Reversed and remanded for proceedings consistent with this opinion.

APPENDIX "C".

Judgment.

United States District Court, Central District of California.

A. B. PARVIN, Plaintiff, v. DAVIS OIL COMPANY, a partnership, JACK DAVIS, MARVIN DAVIS, PAUL MESSINGER, Defendants. Case No. 70-1529 RJK.

Filed: Jan. 11, 1977.

This action came on for trial before the Court, Honorable Robert J. Kelleher, District Judge, presiding, and the issues having been duly tried and decisions having been duly rendered in accordance with Memoranda of Decision filed October 24, 1973 and June 16, 1976 and the Court having made and filed its Findings of Fact and Conclusions of Law it is hereby:

1. ORDERED, ADJUDGED, and DECREED that plaintiff have judgment against defendants Davis Oil Company, Jack Davis, and Marvin Davis, jointly and severally, in the sum of $213,905.15, together with his costs of suit in the amount of ....

2. IT IS FURTHER ORDERED, ADJUDGED, and DECREED, that upon satisfaction of paragraph 1 of this Judgment all interest of plaintiff in the leases described in this Court's Memorandum of Decision filed October 24, 1973 and division orders issued to plaintiff in connection therewith are vested in defendant Davis Oil Company.

3. IT IS FURTHER ORDERED, ADJUDGED and DECREED that upon satisfaction of paragraph 1 of this Judgment plaintiff shall deliver to defendant Davis Oil Company, at the offices of its attorneys,

Gibson, Dunn & Crutcher, the following checks fully endorsed, which were received by plaintiff but never cashed.

Dated	*Amount*
November 25, 1969	$ 98.52
February 9, 1970	1,116.09
February 26, 1970	80.06
March 23, 1970	447.52
April 24, 1970	733.43
May 25, 1970	585.69
June 24, 1970	394.61
June 24, 1970	236.85
August 24, 1970	79.67
September 22, 1970	277.86
December 24, 1970	133.01
January 25, 1971	86.97
February 23, 1971	86.90
April 27, 1971	103.09
October 24, 1971	60.96

Dated at Los Angeles, California this 31 day of December, 1976.

ROBERT J. KELLEHER
UNITED STATES DISTRICT JUDGE

Approved as to form: GIBSON, DUNN & CRUTCHER, IRWIN F. WOODLAND, J. EDD STEPP, JR., RICHARD CHERNICK.

By J. Edd Stepp, Jr., Counsel for Defendants.

Presented by: TYRE & KAMINS, PETER M. APPLETON.

By /s/ Peter M. Appleton, Peter M. Appleton, Counsel for Plaintiff.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

A. B. PARVIN, Plaintiff, v. DAVIS OIL COMPANY, a partnership, JACK DAVIS, MARVIN DAVIS, PAUL MESSINGER, Defendants. CASE NO. 70-1529-RJK.

Filed: Jan. 11, 1977.

This action, having been tried upon the facts by the Court without a jury, the Court does hereby find the facts and states separately its Conclusions of Law thereon and directs the entry of the appropriate judgment as follows:

FINDINGS OF FACT

1. The Court's Memorandum of Decision filed on October 24, 1973 as modified and addended by the Court's Memorandum of Decision filed June 16, 1976 and as addended hereby shall be deemed the Court's Findings of Fact. The Court's memoranda filed on October 24, 1973 and June 16, 1976 are hereby incorporated herein by this reference.

2. As damages, plaintiff is entitled to return of the monies which he paid to defendants in these transactions less what he received. That amount is $213,-905.15.

3. The Court, in the exercise of its discretion, finds that plaintiff should not be awarded any prejudgment interest.

CONCLUSIONS OF LAW

1. The Court's Memorandum of Decision filed on October 24, 1973 as modified and addended by the Court's Memorandum of Decision filed June 16, 1975 and as addended hereby shall be deemed the Court's Conclusions of Law. The Court's memoranda filed on

October 24, 1973 and June 16, 1976 are hereby incorporated herein by this reference.

2. An award of prejudgment interest in a case such as this involving violations of the Federal Securities Laws rests within the equitable discretion of this Court.

3. Under California Law plaintiff is not entitled to prejudgment interest as a matter of right. An award of prejudgment interest in a case such as this wherein a plaintiff recovers monies which he paid for securities issued without a permit in violation of Section 25100 of the 1949 version of the California Corporate Securities Law, Ch. 384, § 1 [1949], Cal. State 698, as formerly codified at Cal. Corp. Code § 25000-26104 (1955), rests within the discretion of the Court.

4. The Court, in the exercise of its discretion, concludes that plaintiff should not be awarded any prejudgment interest on either his California or Federal Securities Law claim.

5. Plaintiff is entitled to $213,905.15 in damages under Section 25100 of the 1949 version of the California Corporate Securities Law and under 15 U.S.C. Section 78aa.

6. Plaintiff is entitled to recover his costs of suit.

Let judgment be entered accordingly.

Dated: December ....., 1976.

United States District Judge

Approved as to form: Gibson, Dunn & Crutcher, Irwin F. Woodland, J. Edd Stepp, Jr., Richard Chernick.

By J. Edd Stepp, Jr., Counsel for Defendants.

Presented by: Tyre & Kamins, Peter M. Appleton.

By /s/ Peter M. Appleton, Peter M. Appleton, Counsel for Plaintiff.

Memorandum of Decision.

United States District Court, Central District of California.

A. B. Parvin, Plaintiff, v. Davis Oil Company, a partnership, Jack Davis, Marvin Davis and Paul Messinger, Defendants. No. 70-1529-RJK.

Filed: June 16, 1976.

This suit, currently on remand from the Ninth Circuit Court of Appeals, began as an action by plaintiff against the defendant oil company for damages concerning certain investment contracts. Plaintiff claims these transactions to be in violation of both the California and federal securities laws. This court, sitting without a jury, dismissed the action, finding that: (1) the oil and gas lease interests purchased by the plaintiff were not securities under either California or federal law; (2) the transactions involved insufficient contacts with California to afford the protections of that state's laws; and (3) the transactions were private offerings and hence exempt from the registration requirements of the Securities Act of 1933. Plaintiff appealed all three rulings.

The Court of Appeals reversed on each of these grounds and remanded for further proceedings on the exemptions issue. First, the Court found these investment contracts to be securities under both federal and California law. Specifically, the Court held these contracts qualified as securities under the federal test established in *Securities and Exchange Commission v. Glen W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973), being transactions "where 'the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which

effect the success or failure of the enterprise.'" (*Parvin v. Davis Oil Company*, 524 F.2d 112, 115-116 (1975)). The Court also found California law viewed these transactions as securities, being contracts which afforded the investor "fractional interests in oil or gas leases coupled with the seller's obligation to conduct an exploration or drilling operation . . . ." *Parvin v. Davis Oil Company, supra.*

Second, the Court of Appeals found the actions which the plaintiff took, while in California, to finalize these investment contracts were sufficient to establish the sales as having taken place in that state, and, thus, as being subject to its laws.

Third, the Court found the investor sophistication test used by this court in determining that these transactions qualified for the private offering exemption from the registration requirement of the Securities Act of 1933 was insufficient as it did not determine whether or not the investor actually had access to the sort of information which would have been contained in a registration statement. The case was thus remanded for determination of both this issue, and that of whether or not these transactions qualified for the joint venture exemption under the California permit requirement, the latter an issue not reached by this court. *Parvin v. Davis Oil Company*, 524 F.2d 112, 118 (1975).

As this action was tried without a jury, and, further, as each party was afforded a full opportunity at trial to present all relevant evidence, no further proceedings need be held in order to comply with the mandate of the Court of Appeals for more specific findings. *Irish v. United States*, 225 F.2d 3, 8 (9th Cir. 1955). Nor is there a need to hear the evidence already given a second time. *Ingraham v. Wright*, 498 F.2d

248, 265 (5th Cir. 1974); *Gulbenkian v. Gulbenkian,* 147 F.2d 173, 177 (2nd Cir. 1945). Accordingly, this court will proceed to make its determination.

The court finds as follows: (1) that these transactions fail to qualify for the joint venture exemption from the California Corporate Securities Law permit requirement; (2) that these transactions also fail to qualify for the private offering exemption from the registration requirement of the Securities Act of 1933; (3) that the defendants' failure to inform the plaintiff that the securities were not registered under either California or federal law constitutes a violation of §10(b) of the Securities and Exchange Act of 1934; and, thus, (4) that the plaintiff is entitled to the relief he seeks.

I. *The California Joint Venture Exemption*

This action arose under the old California Corporate Securities Law (California Corporation Code §§25000 et seq. [West 1954]), adopted in 1949, and amended as of January 2, 1969. Section 25100 of that law[1] demands that an issuer obtain a permit before selling any security. The defendants obtained no such permit; they claim that none was required as these transctions fall within the joint venture exemption from that requirement.

A joint venture is defined as "an undertaking by two or more persons jointly to carry out a single enterprise for profit." *Stillwell v. Trutanich,* 178 Cal. App. 2d 614 (2 Dist. 1960); *Vicioso v. Watson,*

[1]Section 25100 reads as follows:

> Except as otherwise expressly provided in this division, the Corporate Securities Law does not apply to any of the following classes of securities: . . . (m) Any bona fide joint adventure interest, except such interests when offered to the public.

325 F.Supp. 1071, 1075 (C.D. Cal. 1971). California law has required four elements be present in order for a joint venture to be found, these being: "(1) a community of interest among the parties, (2) a share in profits and losses, (3) a close and fiduciary relationship between the parties, and (4) a right to control possessed by each party." *Vicioso v. Watson, supra; Stillwell v. Trutanich, supra* at 288; *Goldberg v. Paramount Oil Company,* 143 Cal. App. 2d 215 (2 Dist. 1956).

By far the most important of these elements to the finding of a joint venture is the right to control. *Bank of California v. Connolly,* 36 Cal. App. 3d 350 (4 Dist. 1974). A joint venture can be found to exist where the parties have unequally exercised their right of control, as where certain functions have been delegated to certain of the parties (*Stillwell v. Trutanich, supra*); however, the essential inquiry concerns whether or not the right itself exists. *Bank of California v. Connolly, supra; Vicioso v. Watson, supra.* "Absent such right, the mere fact that one party is to receive benefits in consideration . . . for capital contribution does not, as a matter of law, make him a partner or a joint venturer." *Bank of California v. Connolly, supra,* at 364.

The question of whether or not a joint venture exists must finally became a matter of "determining the intention of the parties." *Holtz v. United Plumbing and Heating Company,* 49 Cal. 2d 501, 319 P.2d 617, 620 (1957). The court finds there was no such intent present here.

An initial indication of these parties' intent is found in the Operating Agreement itself. Paragraph 21 of this document states:

> The liability of the parties shall be several, not joint or collective . . . . It is not the intention of the parties to create, nor shall this agreement be construed as creating a mining or other partnership or association, or to render them liable as partners.

As the incidents of partnership and of joint venture are essentially identical (*Bank of California v. Connolly, supra*, at 364), and as the "[r]ights and liabilities of joint venturers, as between themselves, are governed by the same principles which apply to a partnership" (*Bank of California v. Connolly, supra*, at 371), such a statement negates any inference from this agreement itself of an intent to form a joint venture.

Of course, the court is not limited in its inquiry to written agreements, but may look to all the facts and circumstances of the situation, including the subsequent conduct of the parties. *Connor v. Great Western Savings and Loan Association*, 69 Cal. 2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1969); *Rickless v. Temple*, 4 Cal. App. 3d 869 (2 Dist. 1970). However, all such circumstances here fail to establish an intent to create a joint venture. As the Court of Appeals recognized, the investors here had but a minimal right of control, sufficient neither in name nor in exercise for the finding of a joint venture. By agreement, these investors were entitled to receive notices concerning the progress of the drilling, were afforded simple access to the drilling sites, and were allowed a voice in deciding whether or not to drill past the casing point. However, the major decisions—those most affecting the ultimate success or failure of the enterprise—were to be made solely by the defendants.

Thus, as he had an insufficient right of control over the essentials of the drilling operations involved here, the plaintiff was not, as a matter of law, a joint venturer, and, thus, these transactions do not qualify for the joint venture exemption from the permit requirement of the California Corporate Securities Law.

II. *The Federal Private Offering Exemption*

Under the Securities Act of 1933 (15 U.S.C. §77 e),[2] there must first be a registration statement in effect with regard to a security before it may be sold through or carried in interstate commerce or the mails. This registration requirement does not apply, however, to "transactions by an issuer not involving any public offering." 15 U.S.C. §77d(2). It is this exemption which the defendants here claim.

In *Securities and Exchange Commission v. Ralston Purina Company*, 346 U.S. 119 (1953), the Supreme Court set forth guidelines for determining when an offering of securities is indeed a private one. In so doing, the court focused upon the intent of the 1933 Act, noting that the "design of the statute is to protect investors by promoting full disclosure of information

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[2]Section 5 of the 1933 Act (15 U.S.C. §77e) reads, in pertinent part:

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

thought necessary to informed investment decisions." *Securities and Exchange Commission v. Ralston Purina Company, supra*, at 124. Thus, the Court stated that:

> . . . the applicability of [the private offering exemption] should turn on whether the particular class of persons affected need the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction "not involving any public offering." *Securities and Exchange Commission v. Ralston Purina Company, supra*, at 125.

A prima facie case for the alleged violation of the registration requirement of the 1933 Act must set forth that "(1) no registration statement was in effect as to the securities, (2) the defendant sold or offered to sell these securities, and (3) interstate transportation or communication and the mails were used in connection with the sale or offer of sale." *Securities and Exchange Commission v. Continental Tobacco Company of South Carolina, Inc.*, 463 F.2d 137, 155 (5th Cir. 1972). This much the plaintiff has established; the burden is thus upon the defendant to prove these transactions qualify for the private offering exemption. *Securities and Exchange Commission v. Sunbeam Gold Mining Company*, 95 F.2d 699, 701 (9th Cir. 1938).

At trial, testimony was offered as to the information actually afforded the plaintiff both before and during his relationship with the oil company. Before investing, the plaintiff was given an opportunity to discuss with the defendants such particulars as the site maps, the engineering and geological reports, and the overall prospects of the intended drillings. During the actual operations themselves, the plaintiff was kept informed concerning the day-to-day progress of the drilling. No evi-

dence was offered, however, which established that the plaintiff had access to the kind of information which would have been available to him had a registration statement been properly filed by the oil company.[3] There was a failure to afford to plaintiff the following: (1) information concerning the company's capital assets; (2) the costs of the offering; (3) the intended use of the proceeds of the offering; (4) the company's other offerings; (5) the company's overall assets and debts; (6) the company's profit and loss statements for several previous years; and (7) copies of and information concerning every material contract made between the company and any other party.

Thus, the defendants have failed to sustain their burden of proof. Accordingly, this court finds the defendants' transactions to have been in violation of §5 of the Securities Act of 1933.

III. *The Securities and Exchange Act of 1934*

Plaintiff cannot predicate his claim for relief simply upon the defendants' violation of §5 of the 1933 Act, for that Act's statute of limitations has already run (15 U.S.C. §77m). However, relief may be afforded under the Securities and Exchange Act of 1934.

The wrongful concealment of the fact that a security is not registered pursuant to the requirement of the

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[3]The information required to be included in a registration statement is set out in 15 U.S.C. §77aa. Briefly stated, other than the information already mentioned, such a statement must include detailed information concerning:

> (1) the issuer's identity; (2) the identity of the issuer's executive personnel and of its promoters; (3) the identity of, and copies of any agreements with, the issuer's underwriters; (4) the character of the issuer's business; and (5) the prices of the securities. Some further information is required for the registration of oil and gas interests or rights by the S.E.C.'s Form S-10.

Securities Act of 1933 has been held to be a material omission in violation of Rule 10b-5 (17 C.F.R. §240.10 b-5), and thus actionable under the 1934 Act with its different limitations period. *Katz v. Amos Treat Company*, 411 F.2d 1046, 1055 (2nd Cir. 1969); *Osbourne v. Mallory*, 86 F.Supp. 869, 879. *See also Rotstein v. Reynolds and Company*, 359 F.Supp. 109, 112 (N.D. Ill. 1973). As the 1934 Act does not provide any particular limitation period within which 10b-5 actions must be brought, the court must look to the period provided by the forum. *Osbourne v. Mallory, supra*. California law[4] provides a "three-year statute of limitations, which begins to run when a plaintiff knows or should have known of the fraud." *Nichols v. Canoga Electronics Corp.*, No. 74-1808 (9th Cir. February 11, 1976). As the series of transactions between plaintiff and defendants concerned here began in 1968, and as the plaintiff filed suit in July of 1970, the plaintiff's action is timely with respect to the 1934 Act.

From the foregoing, it appears, and the court finds, that on the liability issue the plaintiff must prevail. On the issue of damages, which was not reached at

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[4]Cal.Civ.Proc.Code §388(4) (West 1954); Cal.Civ.Code §19 (West 1954).

Cal.Civ.Proc.Code §338(4) read, in pertinent part:

> Within three years: . . .
>
> 4. An action for relief on the ground of fraud or mistake. The cause of action in such case not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Cal.Civ.Code §19 reads, in pertinent part:

> Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.

the trial, the parties are ordered to proceed in accordance with the Federal Rules of Civil Procedure and the Rules of this Court to prepare, serve and file appropriate Memoranda of Contentions of Fact and Law and a Proposed Pretrial Conference Order. Pretrial Conference is set for August 2, 1976, at 10:00 a.m.

The Clerk is ordered to serve by mail on the attorneys for the parties a copy of this Memorandum of Decision.

DATED: June 16, 1976.

Robert J. Kelleher
United States District Judge

Memorandum of Decision.

In the United States District Court for the Central District of California.

A. B. Parvin, Plaintiff, v. Davis Oil Company, a partnership, Jack Davis, Marvin Davis and Paul Messinger, Defendants. Civil No. 70-1529-RJK.

Filed: Oct. 24, 1973.

Pursuant to the stipulation of the parties, and as set forth in the second amended pre-trial conference order, this case proceeded to trial bifurcated into two parts (hereinafter referred to as Trial "A" and Trial "B"). After receipt of evidence, oral and documentary, and after hearing argument of counsel, the Court ordered the matter submitted as to the issues tendered on Trial "A".

This action was brought by the plaintiff, A. B. Parvin, against Davis Oil Company (a partnerhsip composed of Jack Davis, Marvin Davis and Jean Davis) and against Jack Davis, Marvin Davis and Paul Messinger, seeking to recover damages from defendants arising from the alleged offer in sale by defendants to plaintiff of fractional interests in three oil and gas drilling programs, consisting of nine separate exploratory oil and gas wells, and underlying leases, the plaintiff contending that each of the transactions constituted an offer in sale of securities allegedly in violation of section 12 of the Securities Act of 1933 as amended (15 U.S.C. § 77(1)0, section 10(b) of the Securities and Exchange Act of 1934, as amended (15 U.S.C. § 78J(b)), Rule 10b-5, enacted under the Securities and Exchange Act of 1934 (17 C.F.R. § 240.10b-5), and the California Corporate Securities Law as it existed prior to January 1, 1969, being sections

25000, *et seq.*, and more particularly sections 25500, 26100 and 26104.

Defendants contend that the interests purchased by the plaintiff did not constitute securities under any of the foregoing State or Federal statutes.

Jurisdiction is asserted under the applicable sections of the Federal Securities Act and with respect to the claim of violation of the Calfornia Corporations Code, diversity of citizenship and the appropriate jurisdictional amount is claimed.

Most of the facts are admitted as follows:

1. Jack Davis, Marvin Davis, and Paul Messinger were at all times herein mentioned and are now residents of Denver, Colorado. A. B. Parvin was at all times herein mentioned and is now a resident of Beverly Hills, California.

2. Davis Oil Company was at all times herein mentioned and is now a partnerhsip composed of Jack Davis, Marvin Davis, and Jean Davis, with its principal place of business in Denver, Colorado.

3. On or about February 6, 1968, Wilmer I. Pool, as assignor, assigned to Davis Oil Company, as assignee, assignor's interest in two mineral leases covering the real estate described in said assignment and located in LaFourche Parish, Louisiana. On or about March 12, 1968, Pan American Petroleum Corporation as sublessor, and Davis Oil Company, as sublessee, entered into a sublease of the working interest in the oil, gas, and mineral leases described in said sublease and located in LaFourche Parish, Louisiana. Said assignment and sublease or the exploratory oil and gas well drilled thereon are herein described as "C. E. Savoie Unit No. 1" or "Savoie."

4. On or about February 16, 1968, Perrin-Marshland, a joint venture, entered into a written agreement with Davis Oil Company under the terms of which Perrin-Marshland acquired 30% of Davis Oil Company's interest in the Savoie program. On or about February 23, 1968, Mortimer M. Caplin and Davis Oil Company entered into a written agreement under the terms of which Caplin acquired 12½% of Davis Oil Company's interest in Savoie. On or about March 1, 1968, Julius Livingston and Davis Oil Company entered into a written agreement under the terms of which Livingston acquired 12½% of Davis Oil Company's interest in Savoie. Plaintiff A. B. Parvin acquired a 1/8% (12½%) interest in Savoie or $15,000 on or about February 27, 1968. No written agreement was executed between Mr. Parvin and Davis Oil Company with respect to the purchase of this interest.

5. Drilling of the Savoie test well commenced on or about March 1, 1968. The well was not commercially successful and none of the participants received any income from his interest in Savoie. The underlying oil, gas and mineral leases have, by their terms, expired.

6. The Offset program consisted of the following four exploratory oil and gas well prospects: (a) North La Rose Prospect (P. G. Lake No. 1); (b) North Veltin Field Prospect (N. A. Pellerin No. 1); (c) Avondale Prospect (S. D. G. Robicheaux No. 1); and (d) East Bayou Henry Prospect (Sohio-Wilbert No. 1). Said exploratory oil and gas well prospects, the underlying oil, gas and mineral leases or the exploratory oil and gas wells drilled thereon are herein described collectively as "Offset Program."

7. On or about January 22, 1968, William R. Bullen, Jr., as lessor, and Davis Oil Company, as

lessee, entered into an oil, gas, and mineral lease covering the real estate described in said lease and located in LaFourche Parish, Louisiana. Said lease or the exploratory oil and gas well drilled thereon are herein described as "P. G. Lake No. 1" or "Lake."

8. On or about July 20, 1968, Frederick Lionel Maryer, attorney in fact for lessor, and Davis Oil Company, as lessee, entered into a gas and mineral lease covering the real estate described in said lease and located in St. Landry Parish, Louisiana. Said lease or the exploratory oil and gas well drilled thereon are herein described as "N. A. Pellerin No. 1" or "Pellerin."

9. On or about July 1, 1968, Mrs. Sara Day Gibbens Robicheaux and eighteen other persons, as lessors, and Vincent R. Perrin, Jr., as lessee, entered into an oil, gas, and mineral lease covering the real estate described in said lease and located in Jefferson Parish, Louisiana. On or about July 3, 1968, Vincent R. Perrin, Jr., and Davis Oil Company, entered into a written agreement under the terms of which Perrin agreed to assign to Davis Oil Company a three-fourths interest in the oil, gas, and mineral lease between Perrin and Robicheaux, et al., on the conditions described in said agreement. Said lease agreement and the exploratory oil and gas well drilled thereon are herein described as "S.D.G. Robicheaux No. 1" or "Robicheaux."

10. On or about December 12, 1967, Mable Helen Cassidy Tieman, Executrix of the estate of Helen Wilbert Cassidy, as lessor, and Davis Oil Company, as lessee, entered into an oil and gas lease covering the real estate described in said lease, and located in Iberville Parish, Louisiana. On or about December 12,

1967, A. Wilbert Sons Lumber and Shingle Company, a Louisiana corporation, and twenty-seven others, as lessors, and Davis Oil Company, as lessee, entered into an oil and gas lease covering the real estate described in said lease and located in Iberville Parish, Louisiana. Said lease or the exploratory oil and gas wells drilled thereon are herein described as "Sohio-Wilbert No. 1" or "Sohio-Wilbert."

11. On or about June 25, 1968, Davis Oil Company entered into written agreements with the following named persons under the terms of which said persons acquired portions of Davis Oil Company's interest in the Offset program as follows:

Mortimer M. Caplin	12.5%
Harold Toppel	11.25%
Manuel Vallecillo	1.25%
Salvatore Coletta	1.25%
Sergio Camero	1.25%
Edwin Epstein	2.5%
David Epstein	2.5%
George Toppel	2.5%
Milton Toppel	2.5%

On or about July 22, 1968, David L. Kreeger and Marvin Willig each entered into a written agreement with Davis Oil Company, under the terms of which Kreeger and Willig each acquired 3.25% of Davis Oil Company's interest in the Offset program. On or about August 5, 1968, Robert L. Heymann and Davis Oil Company entered into a written agreement under the terms of which Heymann acquired 1.5626% of Davis Oil Company's interest in the Offset program.

12. On or about September 4, 1968, Blaez, Ltd., a limited partnership, entered into a written agreement with Davis Oil Company under the terms of which

Blaez, Ltd., acquired 12½% of Davis Oil Company's interest in the Sohio-Wilbert.

13. The parties have stipulated that with the exception of the names of the parties, the percentages of their interests, the amounts of their payments and the well prospects included, the terms of the agreements between Davis Oil Company and each working interest owner are the same.

14. Subsequent to plaintiff's investment in the C. E. Savoie, the parties discussed plaintiff's participation in further drilling programs. Following these discussions, on or about July 1, 1968, Jack Davis, acting on behalf of Davis Oil Company, at Denver, Colorado, mailed to plaintiff A. B. Parvin, at Los Angeles, California, a letter dated July 1, 1968, which read as follows:

"Deal Al:

"Many, many thanks for your kindness on our recent visit with Marvin and Jean. I really wanted to discuss some things with you about a well, but there was no time as you seemed to be in a rush and a hurry and I did not want to disturb [sic] you.

"I am really determined to get you some very good oil reserves if I can. At this particular time we have four direct offset wells to drill in Louisiana, all have exceptionally large reserves. These wells are deep and very expensive, but we can put you in some of these if you so desire. If you are interested I will send you all the maps and reserve figures.

"We are going to commence these wells in July and if you can give me a quick answer I can

elucidate you further if you are interested. You can call me here at the office and I can proceed immediately with information to you if you are so inclined.

"These deals we usually keep for ourselves, but Marvin and I feel we want to get you some oil and believe this is an opportunity with driect offset wells. These are development fields. They will run approximately 12,000 feet and a 1/16th interest would be between $14,000.00 and $15,-000.00.

"Al, you would not have to go, but these wells really are minimum risk prospects. Would you please let me know if you are interested as soon as you can.

Very truly yours,
Jack Davis"

Said letter was received by Mr. Parvin in the oridnary course of the United States mails. On or about July 3, 1968, Paul Messinger, as authorized agent for Davis Oil Company, at Denver, Colorado, caused a written agreement to be prepared and signed in duplicate on behalf of Davis Oil Company. On or about July 3, 1968, Jack Davis, acting on behalf of Davis Oil Company, at Denver, Colorado, mailed to plaintiff A. B. Parvin, at Los Angeles, California, a letter dated July 3, 1968, and the said written agreement. The letter read as follows:

"Dear Al:

"Enclosed are the Agreements on the four offset wells which we are commencing to drill in the very near future in the State of Louisiana. If all are successful, the monthly income and reserves could be very substantial. I could get our engineers

to draw up the potential in each case, if you so desire.

"I am not enclosing a geological map, but only a plat of the acreage. They are all adjacent to very large oil and gas fields and are the equivalent of development wells.

"I hope this brings good luck and will accomplish what I am trying for you inasmuch as these are not wildcats.

"I am leaving for New York and Washington this coming Monday and will return to Denver on Thursday evening. Let me know if you would like more information.

"With regards from Jean and Marvin,

Sincerely,
Jack Davis"

Said letter and written agreement were received by Mr. Parvin in the ordinary course of the United States mails. Duplicate originals of both the "written agreement" and "operating agreement" (the operating agreement is Exhibit "B" to the written agreement) were signed on behalf of Davis Oil Company, a partnership, by Paul Messinger, its attorney in fact, when Mr. Parvin received them in the mail. Mr. Parvin signed the written agreement and put one fully executed copy in his file, and returned by mail the other to Davis Oil Company at Denver, Colorado.

15. On or about July 24, 1968, Paul Messinger, as authorized agent for Davis Oil Company at Denver, Colorado, caused a letter agreement to be prepared and signed in duplicate on behalf of Davis Oil Company. On or about July 24, 1968, Jack Davis, acting on behalf of Davis Oil Company, at Denver, Colorado, mailed to plaintiff, A. B. Parvin, at Los Angeles,

California, the letter and the letter agreement. Said letter and letter agreement were received by Mr. Parvin in the ordinary course of the mails. The duplicate originals of the letter agreement were signed on behalf of Davis Oil Company, a partnership, by Paul Messinger, its attorney in fact, when Mr. Parvin received them in the mail. Mr. Parvin signed the letter agreement, put one fully executed copy in his file, and mailed the other back to Davis Oil Company at Denver, Colorado; it covered plaintiff's interest in the Offset program.

16. The following constitutes a recap of the working interest ownership in the Offset program as a result of the transactions described in paragraphs 11, 12, 14 and 15:

Lake, Pellerin and Robicheaux—Working interest as follows:

Mr. Harold Toppel	11.2500
Mr. George Toppel	2.5000
Mr. Milton Toppel	2.5000
Mr. Manuel Vallecillo	1.2500
Mr. Sergio Camero	1.2500
Mr. Edwin Epstein	2.5000
Mr. David Epstein	2.5000
Mr. Salvatore Coletta	1.2500
Mr. Mortimer Caplin	12.5000
Mr. David Kreeger	3.1250
Mr. Marvin Willig	3.1250
Mr. A. B. Parvin	7.8125
Mr. Robert L. Heymann	1.5625
DAVIS OIL COMPANY	46.8750
Total	100.0000%

Sohio-Wilbert—Working Interest as follows:

Mr. Harold Toppel	11.2500
Mr. George Toppel	2.5000
Mr. Milton Toppel	2.5000
Mr. Manuel Vallecillo	1.2500
Mr. Sergio Camero	1.2500
Mr. Edwin Epstein	2.5000
Mr. David Epstein	2.5000
Mr. Salvatore Coletta	1.2500
Mr. Mortimer Caplin	12.5000
Mr. David Kreeger	3.1250
Mr. Marvin Willig	3.1250
Mr. A. B. Parvin	7.8125
Mr. Robert L. Heymann	1.5625
Blaez, Ltd.	12.5000
DAVIS OIL COMPANY	34.3740
Total	100.0000%

17. Mr. Parvin paid Davis Oil Company the amounts required of him for his participation in the Offset program as follows: July 8, 1968—$56,000.00, and August 5, 1968—$14,000.00.

18. Neither Lake, Robicheaux, nor Sohio-Wilbert was commercially successful. The decision was made to abandon Lake and Robicheaux at the casing point without attempting to complete them as producers. None of the participants received income from his interests in Lake, Robicheaux, or Sohio-Wilbert. The wells have been plugged and abandoned and the underlying oil, gas, and mineral leases have, by their terms, expired.

19. The decision was made to attempt to complete Pellerin and Sohio-Wilbert as producers. Pursuant to the agreement, Mr. Parvin was billed for and paid the following amounts:

November 6, 1968	$ 1,989.15
November 25, 1968	7,002.36
December 23, 1968	4,215.93
January 15, 1969	232.79
February 25, 1969	32.48
March 7, 1969	5,864.89
March 31, 1969	95.21
April 28, 1969	16.59
May 20, 1969	1,565.81
July 21, 1969	230.32
May 18, 1970	1,406.25
Total	$22,651.78

Plaintiff received the following receipts from his interest in Pellerin:

January 15, 1969	$ 232.45
February 18, 1969	351.63
March 31, 1969	187.30
May 20, 1969	290.76
June 12, 1969	244.30
July 18, 1969	153.22
July 29, 1969	229.94
August 27, 1969	78.42
October 2, 1969	142.13
November 26, 1969	98.52
Total	$2,008.67

20. Davis Oil Company, as operator, incurred the following costs in drilling and/or completing the wells constituting the Offset program:

Lake	
Drilling Cost	$117,022.29
Land Acquisition	7,500.00
Subtotal Cost	$124,522.29
Minus Contribution	106,807.40
Total cost	$ 17,714.89
Pellerin	
Drilling Cost	$120,495.42
Land Acquisition Cost	10,000.00
Subtotal Cost	$130,495.42
Minus Contribution	106,807.40
Total Cost	$ 23,688.02
Total Cost of Completeion	$160,124.27
Davis' Percentage (46.8750)	75,058.25
Grand Total	$ 98,746.27

On October 3, 1969, Davis Oil Company and Clinton Oil Company entered into a written agreement under the terms of which Clinton acquired Davis Oil Company's interest in Pellerin for $144,843.75.

Robicheaux	
Drilling Cost	$ 77,842.40
Land Acquisition Cost	3,500.00
Subtotal Cost	$ 81,342.40
Minus Contribution	99,307.40
Total Cost (Profit)	($ 17,965.00)
Sohio-Wilbert	
Drilling Cost	$625,375.08
Land Acquisition Cost	16,578.00
Subtotal Cost	$641,953.08
Minus Contribution	145,787.66
Total Cost	$496,165.42
Completion Attempt	$ 85,463.44
Davis' Percentage (44.375)	28,346.81
Grand Total	$524,512.23

21. The Wildcat program consisting of the following four exploratory oil and gas well prospects: (a) Southeast Sweet Lake Prospect (Sweet Lake Land & Oil Co. No. 1); (b) East Napoleonville Prospect (Westover Planting Co. No. 1); (c) South Grosse Savanne Prospect (Miami Corp. No. 1); and (d) South Valentine Prospect (Frank E. Ducos No. 1). Said exploratory oil and gas well prospects or the underlying oil, gas, and mineral leases drilled thereon are described collectively as "Wildcat Program."

22. On or about July 31, 1968, Albert D. Miller, as assignor, assigned to Davis Oil Company, as assignee, assignor's interest in two oil, gas and mineral leases described in said assignment and covering the real estate described in said lease and located in Cameron Parish, Louisiana. Said assignment, leases or exploratory oil and gas well drilled thereon are herein described as "Sweet Lake Land & Oil Co., No. 1" or "Sweet Lake."

23. On or about August 8, 1968, St. Emma, Inc., a Louisiana corporation, as lessor, and Davis Oil Company, as lessee, entered into a mineral lease covering the real estate described in said lease and located in Ascension Parish, Louisiana. Said lease or the exploratory oil and gas well drilled thereon are herein described as "Westover Planting Co. No. 1" or "Westover."

24. On or about July 23, 1968, William R. Bullen, Jr., as assignor, assigned to Davis Oil Company, as assignee, assignor's interest in the oil, gas, and mineral lease described in said assignment and covering the real estate described in said lease and located in Cameron Parish, Louisiana. Said assignment or the exploratory oil and gas well lease drilled thereon are described as "Miami Corp. No. 1" or "Miami."

25. On or about July 27, 1968, Annie Le Blanc Federine, as lessor, and Davis Oil Company, as lessee, entered into an oil and gas lease covering the real estate described in said lease, and located in La Fourche Parish, Louisiana. Said leases or the exploratory oil

and gas well drilled thereon are described as "Frank E. Ducos No. 1" or "Ducos."

26. On or about June 25, 1968, Davis Oil Company entered into written agreements with the following named persons under the terms of which said persons acquired portions of Davis Oil Company's interest in the Wildcat program as follows:

Mortimer C. Caplin	12.5%
Harold Toppel	11.25%
Manuel Vallecillo	1.25%
Salvatore Coletta	1.25%
Sergio Camero	1.25%
Edwin Epstein	2.5%
David Epstein	2.5%
George Toppel	2.5%
Milton Toppel	2.5%

On or about July 22, 1968, David L. Kreeger and Marvin Willig each entered into a written agreement with Davis Oil Company, under the terms of which Kreeger and Willig each acquired 3.25% of Davis Oil Company's interest in the Wildcat program.

27. On or about October 22, 1968, Blaez, Ltd., a limited partnership, entered into a written agreement with Davis Oil Company under the terms of which Blaez, Ltd., acquired 12½% of Davis Oil Company's interest in Sweetlake.

28. The parties have stipulated that with the exception of the names of the parties, the percentages of their interests, the amounts of their payments and the

well prospects included, the terms of the agreements between Davis Oil Company and each working interest owner are the same.

29. Subsequent to plaintiff's investment in the C. E. Savoie, the parties discussed plaintiff's participation in further drilling programs. Following these discussions, on or about July 24, 1968, Paul Messinger, as authorized agent for Davis Oil Company, at Denver, Colorado, caused a written agreement to be prepared and signed in duplicate on behalf of Davis Oil Company. On or about July 24, 1968, Jack Davis, acting on behalf of Davis Oil Company, at Denver, Colorado, mailed to plaintiff, A. B. Parvin, at Los Angeles, California, a letter dated July 24, 1968, and the written agreement. Said letter and written agreement were received by Mr. Parvin in the ordinary course of the United States mails. Duplicate originals of both the written agreement and operating agreement (the operating agreement is Exhibit "B" to the written agreement), were signed on behalf of Davis Oil Company, a partnership, by Paul Messinger, its attorney in fact, when Mr. Parvin received them in the mail. Mr. Parvin signed both the written agreement and operating agreement, put one fully executed copy in his file, and returned the other to Davis Oil Company by his letter to Mr. Jack Davis dated August 6, 1968. Davis Oil Company received said letter and written agreement in the ordinary course of the United States mails.

30. The following constitutes a recap of the working interest ownership in the Wildcat program as a result of the transactions described above:

Mr. Harold Toppel	11.2500
Mr. George Toppel	2.5000
Mr. Milton Toppel	2.5000
Mr. Manuel Vallecillo	1.2500
Mr. Sergio Camero	1.2500
Mr. Edwin Epstein	2.5000
Mr. David Epstein	2.5000
Mr. Salvatore Coletta	1.2500
Mr. Mortimer Caplin	12.5000
Mr. David Kreeger	3.1250
Mr. Marvin Willig	3.1250
Mr. A. B. Parvin	9.3750
Blaez, Ltd.	12.5000
DAVIS OIL COMPANY	34.3750
Total	100.0000%

31. Plaintiff paid Davis Oil Company the amounts required of him for his participation in the Wildcat program as follows: August 6, 1968—$95,000.00.

32. Neither Sweet Lake, Westover, nor Miami was commercially successful. The decision was made to abandon Sweet Lake, Westover, and Miami at the casing point without attempting to complete them as producers. None of the participants received income from his interests in Sweet Lake, Westover, or Miami. The wells have been plugged and abandoned and the underlying oil, gas and mineral leases have, by their terms, expired.

33. The decision was made to attempt to complete Ducos as a producer. Pursuant to the operating agreement plaintiff was billed for and paid the following amounts:

May 30, 1969	$13,030.22
June 3, 1969	75.17
July 21, 1969	46.88
August 12, 1969	11.25
Total	$13,163.52

Plaintiff received the following receipts from his interest in Ducos:

February 9, 1970	$ 1,116.09
February 26, 1970	80.06
March 23, 1970	447.52
April 24, 1970	733.43
May 25, 1970	585.69
June 24, 1970	394.61
July 24, 1970	236.85
August 24, 1970	79.67
September 22, 1970	277.86
December 24, 1970	133.01
January 25, 1971	86.97
February 23, 1971	86.90
April 27, 1971	103.09
October 27, 1971	60.96
Total	$ 4,422.71

34. Davis Oil Company, as operator, incurred the following costs in drilling and/or completing the wells constituting the Wildcat program:

Sweetlake	
Drilling Cost	$74,755.57
Land Acquisition Cost	9,163.68
Subtotal cost	83,919.25
Minus Contribution	145,807.40
Total Cost (Profit)	($61,888.15)
Westover	
Drilling Cost	$128,409.46
Land Acquisition	6,745.00
Subtotal cost	135,154.46
Minus Contribution	158,070.61
Total Cost (Profit)	($ 22,916.15)
Miami	
Drilling Cost	$118,129.49
Land Acquisition Cost	17,000.00
Subtotal Cost	135,129.49
Minus Contribution	144,024.51
Total Cost (Profit)	($ 8,895.02)
Ducos	
Drilling Cost	$205,397.48
Land Acquisition Cost	13,350.00
Subtotal Cost	218,747.48
Minus Contribution	136,346.87
Total Cost	$ 82,400.61
Completion Cost	$174,630.57
Davis' Percentage (34.3750)	60,029.26
Grand Total	$142,429.87

To May 11, 1972, the working interest owners in Ducos had received revenues of $131,505.41 and Davis Oil Company, as owner of 34.3750 of the working interest had received $45,204.98.

36. Neither defendants nor any of them obtained or attempted to obtain a permit from the California Commissioner of Corporations for the offer or sale to plaintiff of said interests in the Savoie, Offset, and Wildcat programs.

37. Communications made by Paul Messinger, Reid M. Waltman, and E. L. Karn, Jr., to Mr. Parvin, or Melvin B. Fields, plaintiff's office manager, were made with the knowledge and consent and under the control of Davis Oil Company.

38. No registration statement was in effect with the Securities and Exchange Commission as to the interests in the Savoie, Offset, and Wildcat programs offered and sold to plaintiff.

39. During the course of the work on the Savoie, Offset, and Wildcat programs, Davis Oil Company mailed certain periodic reports to all working interest owners. The Court finds that all reports required by the agreement to be furnished to plaintiff were in fact so furnished.

Also, there are issues of fact between the parties as to whether the modus operandi provided under the various agreements, and in fact followed, was one under which plaintiff had the right to, or did, exercise that degree of control over the operation of the various ventures so as to make him a joint venturer and hence within the statutory exemption. The Court finds that he did not.

Upon the foregoing, there is presented for determination by the Court essentially the questions of whether these transactions by their nature came within the purview of the Federal or State Securities Acts referred to above, and additionally, whether, although coming within the purview of either or both of the Acts, any of the exemptions provided therein existed here.

With respect to the claim under the California Corporations Code, the Court finds that the plaintiff is a highly sophisticated business man, knowledgeable in oil investments, not the sort of person contemplated under the California Act to need or be afforded statutory protection, who, as a member of a small and selective class, learned, as a result of casual social contacts, that an opportunity existed to make an investment with the defendants.

The record indicates that the fractional interests were not offered to the public within the meaning of the California Corporations Code. The groups which in fact participated, and hence to whom it must be assumed the offers were made, were both small, select and relatively insignificant in number. It matters not that there was an absence of close relationship between the offerees, nor does it matter that they were relative strangers amongst themselves as a group and to the defendants. The record indicates that they knew, or at least had the opportunity to know, the general character and business skills of the defendants, together with the risks and opportunities of the projects in which they were to invest their money. They did so with eyes open and they thereby made that special kind of investment as fractional owners of oil and gas interests which were unlike the kinds of investments commonly known as "securities" which are placed in free circulation. The offerees, for example, were restrained

from transferring their interest except that they might have assigned the totality thereof.

In light of the foregoing determination by the Court, it becomes unnecessary to make any determination as to whether the plaintiff and defendants entered into that kind of joint venture which would bring an exemption to the transaction out of the provisions of section 25100(m) of the California Corporations Code. The Court is satisfied, nevertheless, that the control, or the opportunity to control, or the right to control, reposed in the plaintiff was not sufficient to make him a joint venturer with the defendants for the purposes of the statutory exemption.

Another issue tendered with respect to the claim under the California Corporations Act relates to the place where the transaction was negotiated, agreed upon and finalized. As indicated above, it appears that some conversations occurred in three states, some of which took place in California, either in person or by telephone calls with the plaintiff here in the State of California. But the record indicates that all that was done within the State of California was so fragmentary and incidental to the persuading of plaintiff to participate as not to bring transactions within the language of the statutes which requires that the interests be "sold to plaintiff in California" within the meaning of the California statutes. This appears to be the case with regard to the Savoie, the Offset and the Wildcat programs. The Court determines that the transactions were consummated and the contracts entered into outside the state of California and extrinsic to any conversations between the parties conducted by telephone.

With regard to the Securities Act of 1933, the Court makes the same factual findings as noted above. Accordingly, this was not a "security" within the meaning

and definition of the Act, nor did the transaction by the manner in which it occurred fall within the purview of the Act. Accordingly, it becomes unnecessary to determine whether plaintiff acquired a joint venture interest so as to make the transaction exempt under the statute; as indicated above, the Court is satisfied that no joint venture was entered into within the meaning of the Federal Securities Law.

Similarly, with regard to the Securities Act of 1933, the Court finds, on the same grounds noted above, that the interests were not "offered to the public."

With respect to the Securities and Exchange Act of 1934, the Court finds the issues the same as noted above and, accordingly, makes the same finding and determination with respect to issues raised under that Act.

Therefore, the Court finds in favor of the defendants and against the plaintiff on all claims. Hence, no further issues, under Trial "B", or otherwise, remain to be litigated.

This memorandum of decision shall be deemed the Court's findings of fact and conclusions of law. Defendants through their counsel, and pursuant to Local Rule 7, will prepare, serve and lodge an appropriate judgment.

The Clerk of the Court will send, by United States mail, copies of this memorandum to all counsel for the parties herein.

DATED: October 24, 1973.

/s/ Robert J. Kelleher
Robert J. Kelleher
United States District Judge